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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1088

FERMINA MONTEZ, on her own behalf and on behalf of her infant children, JOSE MIRINO MONTEZ and ARMANDO MONTEZ, on behalf of themselves and all others similarly situated,

Petitioners,

—against—

GEORGE K. WYMAN, individually and as Commissioner of the Department of Social Services of the State of New York and JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Question Presented

Did the District Court, in the exercise of its equity powers, abuse its discretion in holding that it would not order the municipal defendant, Goldberg, to pay to petitioner retroactive public assistance benefits allegedly wrongfully withheld?

New York Statute Involved

Social Services Law

"§101. Liability of relatives to support

1. The spouse or parent of a recipient of public assistance or care or of a person liable to become in need thereof shall, if of sufficient ability, be responsible for the support of such person, provided that a parent shall be responsible only for the support of a minor child. Step-parents shall in like manner be responsible for the support of minor step-children.

2. The liability imposed by this section shall be for the benefit of the public welfare district concerned or any legally incorporated non-profit institution which receives payments from any governmental agency for the care of medically indigent persons, and such liability may be enforced by appropriate proceedings and actions in a court of competent jurisdiction. Such proceedings and actions may be brought by such an institution in any court wherein a similar proceeding or action could be brought by a public welfare official."

Statement of the Case

Since in our view the petition does not adequately present the procedural history of this case, we are submitting a summary of this history.

(1)

Petitioner, Fermina Montez, on her own behalf, and on behalf of her infant children, Jose and Armando Montez, and on behalf of all others similarly situated, instituted

this civil action for declaratory and injunctive relief pursuant to 42 U.S.C. Section 1983, on October 31, 1969. Named as defendants were George K. Wyman, individually and as Commissioner of the Department of Social Services of the State of New York, and Jack R. Goldberg, individually and as Commissioner of the Department of Social Services of the City of New York. Petitioner sought relief from the enforcement of §353.3(a)(2) of the Regulations of the New York State Department of Social Services (18 N.Y.C.R.R. 353.3(a)(2)), which regulation (since repealed) required that the income of a stepparent in excess of his own needs as defined by the State be applied against the needs of his stepchildren in their application for assistance. Petitioner in her complaint contended that this regulation arbitrarily assumed that the income of the stepparent was available for the support of his stepchildren and that the enforcement of the regulation constituted a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment, the right to privacy, and the Social Security Act (42 U.S.C. 601 et seq.).

The complaint alleges the following: Petitioner Fermina Montez is the mother of Jose and Armando Montez, 12 and 11 years of age, respectively. The children's father, Jose Montez, stopped all support of the children in June 1968. Petitioner was forced to leave her employment in June 1968 to look after her children, who had dropped out of school. Petitioner divorced Jose Montez in October 1968. Montez's present "whereabouts" was not known. In January of 1969 petitioner married Luis Perdomo. He was unable to contribute to the children's support other than the cost of shelter. Petitioner received public assistance under the Aid to Families with Dependent Children (AF DC) program on behalf of the two Montez children. In

February of 1969, she received a "Notice of Intent to Suspend Public Assistance". Aid was cut off as of February 1, 1969.* At a hearing held on March 11, 1969, petitioner was required to report her husband's income, to be figured into the calculation of her aid. On April 2, 1969, petitioner requested a hearing to review her treatment. Petitioner claimed that there was no response to this request.

The petitioner in her complaint requested the issuance of temporary and permanent injunctions, the convening of a 3-Judge Court under 28 U.S.C. §§ 2281 and 2284, a declaratory judgment pursuant to 28 U.S.C. § 2202, and retroactive payments. Jurisdiction was alleged under 28 U.S.C. §§ 1343 (3) and 1343(4).

On December 11, 1969, Judge FRANKEL denied the plaintiff's application for a temporary restraining order and the convening of a 3-Judge Court. He endorsed the moving papers:

> "Plaintiff concedes there is no dispute as to her present or future entitlement, but only an open question as to past allowances. The basis for this motion being concededly absent, it is denied. So ordered."

(2)

On May 27, 1970, Judge METZNER denied an application by one Delia Cancel to intervene in the action, suggesting

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* It should be noted that petitioner's aid was terminated on February 11, 1969 because of her marriage. Assistance was resumed on February 19, 1969. A pre-termination review was held on March 11, 1969 because Mrs. Perdomo refused to allow the Department of Social Services to complete its investigation. As a result of this review aid was again terminated on March 24, 1969. Petitioner reapplied for assistance on March 25, 1969, and, since her husband had signed an application for public assistance, the aid was restored on April 1, 1969.

that she commence an entirely new action. An action was subsequently instituted challenging the aforementioned state regulation. *Cancel* v. *Wyman,* 321 F. Supp. 528 (S.D. N.Y., 1970). On August 24, 1970, Judge COOPER denied Cancel's application for the convening of a 3-Judge Court on the basis that no substantial constitutional question was raised. Judge COOPER permitted maintenance of a class action, and left for trial the issue as to the existence of a conflict between state and federal regulations. An appeal of this decision was subsequently dismissed. *Cancel* v. *Wyman,* 441 F. 2d 553 (2d Cir., 1971).

(3)

In the present case, on February 25, 1971, petitioner moved for summary judgment to recover retroactive payments allegedly due her for the period from February 1, 1969, through December 31, 1969, in the amount of $809.20. On May 5, 1971, Judge METZNER denied the motion, stating:

> "In view of Judge Frankel's decision, this action has been limited to recovery by plaintiff of allegedly past due deficiencies during a specified period. . . .
>
> I agree with Judge Cooper that the asserted constitutional bases of plaintiff's claim are insubstantial. On the contention that the regulations (18 N.Y.C.R.R. §353.3(a)(2)(i) and 45 C.F.R. §203.1) are inconsistent, I would deny summary judgment since the resolution of the issue is not clear. In fact it would appear that the result would be contrary to plaintiff's contention. Finally, there is serious doubt, as gleaned from the affidavits, as to whether any sum is due this plaintiff."

On September 20, 1972, an order was entered by the District Court for the Southern District of New York, dis-

missing the action for lack of prosecution. However, on motion of the petitioner, this order was vacated on January 18, 1973. On February 14, 1973, defendant Wyman moved pursuant to Rule 12, Fed. R. Civ. Pr., to dismiss the complaint as to him for lack of jurisdiction, and, pursuant to Rule 15, Fed. R. Civ. Pr., to amend his answer to include the Eleventh Amendment as a bar to retroactive payments as sought by plaintiff. On May 7, 1973, defendant Wyman's motion to dismiss the complaint was granted. Judge BONSAL wrote:

> "In view of Judge Metzner's decision, the only remaining issue is whether plaintiff is entitled to retroactive payments for alleged past deficiencies in her A.F.D.C. payments.
>
> . . . Under the Eleventh Amendment this court does not have jurisdiction to direct that the State of New York make retroactive payments out of State funds for alleged past deficiencies in A.F.D.C. payments (citing cases)."

(4)

On December 17, 1973, defendant Goldberg moved pursuant to Rule 12(b)(1) and (6) Fed. R. Civ. Pr., for an order dismissing the complaint as to him on the grounds that the Court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief might be granted.

Petitioner had originally contended, on the basis of the affidavits filed with respect to her earlier motion for summary judgment, in 1972, that she was entitled to a total of $2,384.70 in public assistance from February 1, 1969 through December 31, 1969, of which amount she claims to

have received $1,575.50, leaving a balance of $809.20. At the time of defendants' motion to dismiss, petitioner claimed that she was entitled to a total of $3,370.82 for the year 1969, with a balance allegedly still due of $1,795.32.

In an affidavit in support of defendant Goldberg's motion to dismiss, Gayle Redford, an Assistant Corporation Counsel, contended that petitioner's calculations are inaccurate in that they do not take into account the fact that her husband, Mr. Perdomo was placed on petitioner's welfare budget in April 1969 and that his income was included in the computation of petitioner's need for the following nine month period of 1969. Moreover, the calculations do not accurately reflect the extent to which Perdomo's income should have been applied in determining his and petitioner's welfare benefits.

The cancelled welfare checks submitted by defendant Goldberg indicate that from April 1, 1969, through December 31, 1969, virtually every check under case number 2769360 was issued to Luis Perdomo; only two, totalling $46.00, were issued to plaintiff. The checks issued to Luis Perdomo supplemented his monthly income of $278.00. This income should have been applied in calculating the benefits due Perdomo and, at the very least, plaintiff (and their son Luis), during the 9 months in which they were on the same welfare budget. These earnings totalled $2,502.00 ($278.00 $\times$ 9) from April 1, 1969 through December 31, 1969. Despite this income, petitioner claimed that her husband was giving her only about $100 a month.

The affidavit in support of defendant Goldberg's motion showed that no money was owed to the petitioner. While petitioner claimed that, from February 1, 1969 through

December 31, 1969, she received only $1,575.59 in assistance, the cancelled checks submitted by defendant Goldberg clearly indicated that petitioner and her husband were actually paid $2,051.45 during that period under case number 2769360.

In addition, payments totalling $1,203.44 were paid by the Department of Social Services under the medicaid program for hospitalization of petitioner in connection with her pregnancy and the birth of Luis Perdomo in November, 1969. This child is the son of petitioner and Luis Perdomo. Even if Perdomo's salary had not been applied in calculating welfare benefits due petitioner and her husband, then it should have been applied to the hospital bills incurred by petitioner. This was not done.

Judge BONSAL granted defendant Goldberg's motion to dismiss the complaint, treated as a motion for summary judgment. In a decision dated March 25, 1974, Judge BONSAL wrote (Appendix to Petition, pp. A5-A6):

> "... Under New York Social Welfare Law §101 (1966) Mr. Perdomo was responsible for the support of the two Montez children from January, 1969, when he became the husband of Fermina Montez. If Mr. Perdomo is included in the calculations, plaintiff would have been entitled to a total of $2,025.18 in public assistance benefits for the year 1969. The affidavits, however, show that plaintiff and her husband received $2,051.45, which is of course more than this amount. In any event, the award of retroactive benefits for alleged past deficiencies in AFDC payments lies within the federal courts' equity powers. See Rothstein v. Wyman, 467 F. 2d 226 (2d Cir. 1972), cert. denied, 411

U.S. 921 (1973). On the basis of the record herein, the Court finds no basis for the exercise of its equity powers to grant the claimed retroactive payments."

The Court of Appeals for the Second Circuit affirmed, without opinion, on December 5, 1974.

ARGUMENT

The Court of Appeals for the Second Circuit properly affirmed the order of the District Court for the Southern District of New York, which granted the Municipal Defendant's motion for dismissal, treated as a motion for summary judgment.

(1)

The only issue before the District Court was whether petitioner is entitled to retroactive payments for alleged past deficiencies in her AFDC payments. Petitioner had originally contended, on the basis of the affidavits filed with respect to her earlier motion for summary judgment, that she was entitled to a total of $2,384.70 in public assistance from February 1, 1969, through December 31, 1969, of which amount she claimed that she received $1,575.50, leaving a balance due of $809.20. Subsequently, petitioner claimed that she was entitled to a total of $3,370.82 for the year 1969, with a balance allegedly due of $1,795.32.

The Municipal Defendant Goldberg made a motion to dismiss the complaint as to him on the ground that the Court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief might be granted. Defendant Goldberg's motion was ac-

companied by an affidavit by Assistant Corporation Counsel, Gayle Redford, and photocopies of cancelled welfare checks issued to the petitioner and her husband for 1969. The affidavit and the checks conclusively proved that, while petitioner claimed in her complaint that she received only $1,575.50 in assistance from February 1, 1969 through December 31, 1969, petitioner and her husband were actually paid $2,051.45 during that period under case number 2769360. It was also affirmed that petitioner's figures for amounts allegedly due were incorrect in that they did not take into account the fact that Mr. Perdomo was placed on petitioner's welfare budget in April 1969 and that his income was included in the computation of plaintiff's need during this period.

The decision of the District Court stated that under New York Social Welfare Law §101 (1966), Mr. Perdomo was responsible for the support of the two Montez children from January, 1969, when he became the husband of Fermina Montez. Judge Bonsal's opinion indicated that the petitioner was very likely overpaid for the year 1969. However, the decision did not expressly rest on this ground. The Court instead concluded that: "On the basis of the record herein, the Court finds no basis for the exercise of its equity powers to grant the claimed retroactive payments." The Court did not discuss defendant Goldberg's asserted Eleventh Amendment defense.

(2)

Under the Federal Rules of Civil Procedure a Rule 12 (b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is to be converted into motion for summary judgment whenever matters outside the pleadings are presented to and accepted by the Court.

In the instant case municipal defendant Goldberg's motion to dismiss was accompanied by an affidavit and cancelled checks which, we believe, conclusively showed that the petitioner was not, in fact, owed any additional money, since she was paid $2,051.45 from February 1, 1969 through December 31, 1969 under case number 2769360.* The District Court's opinion does not purport to rest on this ground. However, the Court did appear to accept the defendant Goldberg's figures as accurate. Based upon this showing by the defendant Goldberg, and the failure of plaintiff, in the court below as well as in this petition, to present any convincing contrary figures, we submit that this was an *a fortiori* case for the trial court's declining to exercise its discretion to refuse equitable relief.

It is accepted that under *Rothstein* v. *Wyman,* 467 F. 2d 266 (2nd Cir., 1972), *cert. denied,* 411 U.S. 921 (1973), the Court's equity jurisdiction may be used to determine if retroactive benefits are recoverable in cases involving categorical aid under the Social Security Act. In *Rothstein,* a case brought by recipients of Aid to the Aged Blind and Disabled from the seven counties surrounding New York City challenging Social Services Law §131-a, the District Court enjoined the defendants from enforcement of that statute and awarded retroactive benefits. On appeal, the Court of Appeals for the Second Circuit held that the award

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* In the Second Circuit affidavits and exhibits have been accepted on Rule 12(b)(6) motions, and when so accepted the motion becomes one for summary judgment. See, *e.g., Thompson* v. *New York Central R.R. Co.,* 361 F. 2d 137 (2nd Cir., 1966) (affidavits); *Larsen* v. *American Airlines Inc.,* 313 F. 2d 599 (2nd Cir., 1962) (affidavit); *General Tire and Rubber Co.* v. *Jefferson Chem. Co.,* 46 F.R.D. 607 (S.D.N.Y., 1969) (exhibits); *Madeirense DO Brasil S/A* v. *Stulman-Emrick Lumber Co.,* 147 F. 2d 399 (2nd Cir., 1945), cert. den. 325 U.S. 861 (1945) (exhibits—letter).

of retroactive payments by the District Court was not a proper exercise of the District Court's equitable powers. The Court said that in wielding equity power the Court must weigh competing claims and determine where a preponderance of the equities lies.

In this case, petitioner has not demonstrated on what basis the Court had any discretion to exercise its equitable power. The defendant Goldberg's calculations as shown by the affidavit and cancelled checks were not successfully challenged by petitioner. Since there was apparently no money owed to the petitioner, under any construction of the equities involved in this case, the District Court properly found that there was no basis upon which to exercise its equity jurisdiction.

(3)

Petitioner contends (Pet., p. ix) that on March 25, 1974, the District Court for the Southern District of New York (BONSAL, J.) granted the municipal defendant's motion to dismiss on the grounds of the Eleventh Amendment sovereign immunity. We respectfully submit that Judge BONSAL dismissed the case because on the basis of the record, including affidavits of the Municipal Defendant indicating that petitioner is not entitled to any money from the Municipal Defendant, the Court found "no basis for the exercise of its equity powers to grant the claimed retroactive payments." The District Court and the Circuit Court, then, did not base their respective determinations on the application of the Eleventh Amendment to the City of New York. This is, then, not a proper case for the United States Supreme Court to determine whether the Eleventh Amendment immunity extends to municipalities alleged to owe retroactive benefits to welfare recipients.

CONCLUSION

The petition for writ of certiorari should be denied.

April 7, 1975.

Respectfully submitted,

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